No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

GUY ZAPPULLA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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May 10, 2005

QUESTIONS PRESENTED

1. Under what circumstances does the passage of time between the administration of *Miranda* warnings and a suspect's statement to the police undermine the effectiveness of the warnings and require suppression of the statement?

2. Does the standard of harmless error set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), still apply on habeas corpus review under 28 U.S.C. § 2254 after the amendment of that statute by the Antiterrorism and Effective Death Penalty Act of 1996?

PARTIES TO THE PROCEEDING

The petitioner in this Court is the State of New York. The State is represented in this federal habeas corpus proceeding by Kings County District Attorney Charles J. Hynes, by agreement with the Attorney General of the State of New York. The respondent in this Court is Guy Zappulla, who was convicted of murder in New York State court and filed the federal habeas corpus petition that is the subject of this litigation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The State of New York requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit that reversed a judgment of the United States District Court for the Eastern District of New York (Weinstein, J.), and remanded the case to that court, with a direction to grant Guy Zappulla's petition for a writ of habeas corpus unless the State grants a new trial within a reasonable period. The United States District Court for the Eastern District of New York had denied the petition for a writ of habeas corpus, holding that the state appellate court had correctly concluded that admission of Zappulla's confession to police was harmless error.

Opinions Below

The citation of the opinion of the United States Court of Appeals for the Second Circuit is *Zappulla v. New York*, 391 F.3d 462 (2d Cir. 2004). The citation of the opinion of the United States District Court for the Eastern District of New York is *Zappulla v. New York*, 296 F. Supp. 2d 309 (E.D.N.Y. 2003). The citation of the opinion of the Appellate Division is *People v. Zappulla*, 282 A.D.2d 696, 724 N.Y.S.2d 433 (App. Div. 2d Dep't 2001). The oral decision of the state trial court on the motion to suppress is unreported. Each of these opinions is reproduced in the Appendix to this petition.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 17, 2004, and amended on December 7, 2004. The State's

timely petition for a rehearing en banc was denied on February 9, 2005. This petition for certiorari was filed within ninety days of February 9, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

United States Constitution, Fifth Amendment:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

United States Constitution, Fourteenth Amendment:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

28 United States Code § 2254:

> **State custody; remedies in Federal courts**
>
> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> . . . .
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Introduction

Defendant, Guy Zappulla, was tried and convicted before a jury of the intentional murder of Jennifer Scarpati, whose strangled body the police found on March 17, 1998, in Brooklyn, New York, under the bed in the motel room where she had been staying with defendant. A state appellate court affirmed defendant's judgment of conviction, concluding that admission at trial of his murder confession, made 24 hours after *Miranda* warnings were given, was error, but harmless in light of the overwhelming evidence of defendant's guilt. *See Miranda v. Arizona*, 384 U.S. 436 (1966). The district court denied defendant's petition for a writ of habeas corpus, concluding that the evidence of defendant's guilt was overwhelming and that the state appellate court correctly determined that admission of the confession was harmless error.

In a split decision, the Second Circuit reversed the district court's order, concluding that defendant's confession was admitted in violation of his *Miranda* rights and that the state appellate court's determination of harmless error was objectively unreasonable. The Second Circuit majority granted habeas relief without

applying the test of harmless error set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). The dissenting judge agreed with the district court that the evidence of defendant's guilt was overwhelming and that the determination of the state appellate court was not objectively unreasonable.

This case presents two independent questions, each of which warrants this Court's consideration: (1) under what circumstances does the passage of time—which in this case was 24 hours—between the administration of *Miranda* warnings and a suspect's statement render that statement constitutionally inadmissible, and (2) after the Antiterrorism and Effective Death Penalty Act of 1996, is a federal court required to apply the harmless error test of *Brecht v. Abrahamson* to a trial error asserted by a state prisoner before the court may grant habeas corpus relief.

The Motion to Suppress Defendant's Confession

Prior to trial, defendant moved to suppress his statements, made on March 18, 1998, to Detectives Delahunt and McMahon, in which he admitted that he had strangled Jennifer Scarpati in a motel room in Brooklyn, New York. The suppression hearing testimony showed that Detective Delahunt, who was searching for defendant in connection with a March 15, 1998, burglary and larceny at the home of defendant's girlfriend, Margaret Tarulli, had issued a wanted poster for defendant. Police officers who had seen the poster arrested defendant at about 12:30 a.m. on March 17, 1998, in a hallway of the Golden Gate Inn, a motel in Brooklyn. After defendant's arrest, Detective Delahunt read defendant *Miranda* warnings on March 17, 1998, at about 1:20 a.m. at the 61st Precinct stationhouse, and defendant agreed to speak with him. Defendant spoke to Delahunt about

other matters but made no statements concerning the theft of a fur coat and jewelry belonging to Tarulli. Afterwards, a police officer found in defendant's pocket a key to Room 234 at the Golden Gate Inn. At about 8:45 a.m., Detective Delahunt and the motel manager went to Room 234, where the manager saw a fur coat. Room 234 was secured, and Detective Delahunt obtained a search warrant for the room. Detective Delahunt returned to Room 234 at about 6:00 p.m. to execute the warrant and discovered the strangled body of Jennifer Scarpati under the bed.

Meanwhile, as police officers were escorting defendant from their vehicle into Brooklyn Central Booking, defendant broke free and ran up the block to an intersection, where he was struck by a car and captured by the police. The police took defendant to a hospital and then back to the 61st Precinct stationhouse.

Detectives Delahunt and McMahon spoke with defendant at the 61st Precinct at about 1:15 a.m. on March 18, 1998. Defendant appeared tired and had a limp, but nothing else seemed wrong with him. Without repeating *Miranda* warnings to defendant, the detectives asked defendant about the motel room and told defendant that they had found Scarpati's body. Defendant said that he thought it would be best if he had a lawyer present. Detective McMahon told defendant that Detective Delahunt had advised defendant of his rights and that if defendant wanted a lawyer, one would be obtained, but the police would not speak with defendant. Defendant said that he did not want an attorney for himself and that he wanted the district attorney. Defendant said that he wanted the district attorney so that he could make a full statement and receive a guarantee that he would get the death penalty, because he did not want to go back to jail or spend his life in solitary confinement. Detective

McMahon told defendant that defendant would have to speak with the detectives before he spoke with the district attorney and that no one would guarantee him any type of sentence. Defendant said to tell the district attorney when he arrived that there were several people in the room, that they left, that defendant was alone in the room with the girl, and that when defendant left, she was dead.

Defendant admitted to the detectives that he had been staying in the room with Scarpati for three days and that they had smoked crack with a man whom defendant knew as Aaron or TeAmo. Defendant said that after Aaron had gone, defendant and Scarpati got into an argument over the disappearance of some jewelry, and defendant strangled Scarpati.

The hearing court denied suppression of defendant's confession, concluding that defendant had been given *Miranda* warnings within a reasonable time prior to defendant's statements, that the time between *Miranda* warnings and defendant's confession was in part attributable to defendant's act of absconding, and that repetition of *Miranda* warnings was unnecessary because it was clear when defendant said that he wanted to speak to an attorney that he had not forgotten his rights (App. at 81a, 83a-86a). The hearing court also concluded that defendant had not unambiguously invoked his right to counsel (App. at 85a).

The Trial

At the trial, the State introduced evidence that on March 15, 1998, defendant joined Jennifer Scarpati, whom defendant knew, and Scarpati's friends, Aaron Cohen and Bruce Brodsky, on Brodsky's boat, docked near the Golden Gate Inn. Scarpati worked as a prosti-

tute, and Cohen was a gypsy cab driver. Defendant gave Cohen money to rent a room for defendant and Scarpati at the Golden Gate Inn, as neither defendant nor Scarpati wanted anyone to know that they were there. At about 7:30 or 8:00 p.m., Cohen drove Scarpati and defendant to the motel, and defendant and Scarpati entered by a side door. After smoking cocaine with defendant and Scarpati in Room 234, Cohen left defendant and Scarpati in the room.

The next morning, Cohen telephoned defendant from the lobby of the motel, and defendant asked Cohen to come to Room 234. When Cohen arrived at the room, defendant was there, and Scarpati was sleeping. Defendant gave Cohen some jewelry to sell and asked Cohen to buy crack cocaine. On March 16, 1998, at about 11:30 a.m., Cohen returned to Room 234 and gave defendant the drugs he bought and the money left over from the sale of the jewelry. Defendant gave Cohen some of the money, and Cohen smoked crack with defendant. After defendant gave Cohen money to pay for the room for another day, Cohen went downstairs, paid for the room, and returned to Room 234, where he smoked crack with defendant. Cohen then left the motel.

At about 2:00 p.m. on March 16, 1998, Cohen called Room 234 and spoke with Scarpati. Cohen called the room again at about 5:00 p.m. and spoke with defendant. When Cohen asked where Scarpati was, defendant told him that they had had a fight, that Scarpati had left the room, and that defendant did not know where she was.

Motel surveillance tapes showed defendant walking out of the motel on March 16, 1998, at about 11:12 p.m. Telephone records showed that three calls were made from Room 234 between 12:06 and 12:11 a.m. on March 17, 1998. Motel surveillance tapes showed defendant

walking out of the motel again at 12:18 a.m. and then reentering the motel shortly thereafter. The tapes also showed police officers arriving at the motel at 12:21 a.m. The police, who had been called to investigate an unrelated dispute at the motel, encountered defendant in the second-floor hallway of the motel. Recognizing defendant from a wanted poster, the police arrested defendant and took him to the 61st Precinct station-house, where Detective Delahunt gave defendant *Miranda* warnings at 1:20 a.m.

A police officer searched defendant and recovered a key to Room 234. At about 8:45 a.m., Detective Delahunt went to Room 234 with the motel manager, who entered the room and saw a fur coat in an open dresser drawer. The motel room door was secured, and Detective Delahunt obtained a search warrant for the room. Detective Delahunt returned to Room 234 at about 6:00 p.m. to execute the warrant and found Scarpati's fully-clothed body stuffed underneath the bed. A pair of underpants was wrapped around Scarpati's neck as a ligature. A forensic investigator who examined her body at the scene determined that Scarpati's death occurred between 9:00 p.m. on March 16, 1998, and 5:00 a.m. on March 17, 1998. The medical examiner concluded from the autopsy that Scarpati died from ligature strangulation. The blood from Scarpati's nose and mouth had been shed after her strangulation and death had occurred. The police found a blood stain on the wallpaper near the bed under which Scarpati's body had been hidden.

Meanwhile, as the police were escorting defendant to Central Booking to continue his arrest processing, defendant escaped from the police and ran forty feet to an intersection. The police chased defendant, a car collision ensued, and the police captured defendant at the intersection. The police took defendant to the hospital and

then back to the 61st Precinct, where Detectives Delahunt and McMahon spoke with defendant at about 1:15 a.m. on March 18, 1998. *Miranda* warnings were not repeated. Defendant said that he wanted an attorney, and Detective McMahon reminded defendant that Detective Delahunt had given defendant *Miranda* warnings and that if defendant wanted an attorney, one would be provided, but that the detectives would not speak to him. Defendant then said that he was referring to the district attorney, from whom defendant wanted a guarantee that he would get the death penalty because he did not want to go back to jail. Defendant admitted that he had choked Scarpati and that she was dead when he left the room.

In a signed statement, defendant said that he had been staying with Scarpati in the room for about three days and that he had gone to the room with his girlfriend Margaret's fur coat and jewelry. Defendant said that Aaron had left and returned with more drugs, and that Aaron said he had used Margaret's jewelry to get the drugs. Defendant said that he got mad because he had not given Aaron and Jennifer permission to sell the jewelry. Defendant admitted that, although he was mad, he still used the drugs. After Aaron left the room, defendant argued with Jennifer about the jewelry, and Jennifer started to fight with him. Defendant fought back and choked her. In the signed statement, defendant stated that she was unconscious when he left the room and he did not know if she was dead.

After speaking with defendant, Detective Delahunt took defendant's clothing, which was stained. Three chains were found in defendant's pants pocket. DNA tests showed that blood found in multiple locations on defendant's clothing and boots was Scarpati's.

While incarcerated before trial, defendant spoke to a fellow inmate, Felix Pabon, about the incident. Defendant told Pabon that he went to a motel with some people, and that they were getting high. Defendant said that he fell asleep, and when he awoke, he was missing some jewelry that had been in his pocket. Only the victim, whom defendant referred to as a prostitute, was there, and defendant blamed her. She said she did not do it, and defendant started beating her up and then choked her. Defendant said that when he choked her, some blood came out of her and got on the wall. Defendant told Pabon that he choked her to death and that he then broke her back and put her under the mattress.

Defendant was convicted of intentional murder and was sentenced to a prison term of 25 years to life.

The State Appeal

On appeal to the New York Supreme Court, Appellate Division, Second Judicial Department, defendant claimed that his confession should have been suppressed. The Appellate Division affirmed the judgment of conviction (App. at 75a-79a). *People v. Zappulla*, 282 A.D.2d 696, 724 N.Y.S.2d 433 (App. Div. 2001). Noting that no reported case in New York had held that a 24-hour interval in questioning was reasonable, the Appellate Division held that "the 24-hour gap between the issuance of *Miranda* warnings to the defendant and his second interrogation was not a reasonable time," but concluded that admission of defendant's confession did not require reversal of the conviction "in view of the overwhelming evidence of his guilt" (App. at 78a). 282 A.D.2d at 697-98, 724 N.Y.S.2d at 435-36. The Appellate Division noted:

> A witness testified that the defendant was with Scarpati in room 234 at the Golden Gate Inn in the

> days and hours immediately before the crime. Surveillance videotape from the motel showed the defendant leaving and then reentering the motel shortly before the police arrived and arrested him on March 17, 1998. Expert testimony indicated that Scarpati's death occurred sometime between the evening of March 16 and the early morning of March 17. The key to Room 234, the room where Scarpati's body was found, was recovered from the defendant's person after his arrest. D.N.A. testing of blood found on the defendant's clothing revealed that the blood was Scarpati's. In addition, the defendant admitted to an inmate, who was incarcerated with the defendant pending trial, that when he choked Scarpati "blood came out."

(App. at 78a-79a). 282 A.D.2d at 698, 724 N.Y.S.2d at 436. The Appellate Division concluded that there was "no reasonable possibility that the error of admitting the defendant's statement into evidence might have contributed to his conviction" (App. at 79a). 282 A.D.2d at 698, 724 N.Y.S.2d at 436.

Defendant's application for leave to appeal from the order of the Appellate Division to the New York Court of Appeals was denied. *People v. Zappulla*, 96 N.Y.2d 909, 756 N.E.2d 96, 730 N.Y.S.2d 808 (2001) (Ciparick, J.).

The Federal Court Proceedings

By petition filed in 2002, defendant sought a writ of habeas corpus in the United States District Court for the Eastern District of New York. In his petition, defendant challenged the admission of his confession to the police.

By a memorandum and order dated September 30, 2003, the district court denied the petition (App. at 55a-74a). *Zappulla v. New York*, 296 F. Supp. 2d 309

(E.D.N.Y. 2003). The district court concluded that the evidence against defendant, even aside from his confession to police, was overwhelming and that the Appellate Division reasonably explained why it deemed the error in not suppressing the confession to be harmless (App. at 70a-71a). 296 F. Supp. 2d at 319. Citing *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the district court further concluded that in light of the overwhelming evidence against defendant, there was no reasonable probability that the introduction of his confession to the police had a substantial and injurious effect or influence in determining the jury's verdict (App. at 69a-72a). 296 F. Supp. 2d at 318-19.

A divided panel of the United States Court of Appeals for the Second Circuit reversed the judgment of the district court, vacated defendant's murder conviction, and remanded the case to the district court, instructing the district court to grant the writ of habeas corpus unless the State granted defendant a new trial within a reasonable period (App. at 1a-54a). *Zappulla v. New York*, 391 F.3d 462 (2d Cir. 2004). The Second Circuit concluded that it was "'objectively unreasonable' for the Appellate Division to decide 'beyond a reasonable doubt that [the trial court's wrongful introduction of the unlawfully obtained confession into evidence] did not *contribute to* the verdict obtained'" (App. at 23a). 391 F.3d at 475 (quoting *Mitchell v. Esparza*, 540 U.S. 12, 17-18 [2003] [per curiam]; brackets and emphasis by Second Circuit). The two judges of the Second Circuit majority characterized the other evidence of defendant's guilt as "weak" (App. at 10a, 15a). 391 F.3d at 468, 471. The Second Circuit majority considered it a "fact" that "a written confession can never truly be said to be merely cumulative" (App. at 21a). 391 F.3d at 474. The Second Circuit granted habeas relief for the asserted trial error without determining that the error was prejudicial under

the standard of *Brecht v. Abrahamson*. In addition, rejecting the State's argument that there was no *Miranda* error in admitting defendant's confession to the police, the Second Circuit majority held that admission of defendant's confession "constitutes a violation of Zappulla's due process rights" (App. at 22a). 391 F.3d at 474.

Dissenting, Judge Raggi agreed with the district court that the Appellate Division's harmless error determination was not objectively unreasonable (App. at 25a). 391 F.3d at 476. Judge Raggi found that the evidence of defendant's guilt was "overwhelming" and considered it "entirely reasonable for the Appellate Division to have cited [the surveillance] evidence, together with [Aaron] Cohen's testimony and Zappulla's possession of the motel room key, as overwhelming proof, independent of the signed confession, that Zappulla was with Scarpati at and about the time of her death" (App. at 28a, 31a). 391 F.3d at 477, 479. Noting the blood and DNA evidence linking defendant to Scarpati's murder, Judge Raggi found that the circumstantial evidence of defendant's guilt was "remarkably strong" and that there was direct proof in the form of Zappulla's admission to fellow inmate Felix Pabon, which was "considerably more detailed about events related to Scarpati's murder than his signed confession to the police" and was extensively corroborated by other evidence (App. at 32a-37a). 391 F.3d at 479-82. Judge Raggi also did not join the holding of the Second Circuit majority that *Miranda* mandated suppression of Zappulla's statements regarding the Scarpati murder (App. at 54a). 391 F.3d at 490.

On February 9, 2005, the Second Circuit denied the State's petition for a rehearing en banc. App. at 87a-88a.

This petition for certiorari challenges the decision of the court of appeals.

REASONS FOR GRANTING THE WRIT

The State is seeking a writ of certiorari because this case presents two important, controversial, and recurring questions of federal law, each of which was resolved incorrectly by the court of appeals and warrants review by this Court.

First, the Second Circuit majority concluded that admission of defendant's confession to the police violated his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), primarily because defendant made that statement 24 hours after he had received *Miranda* warnings. The question of when *Miranda* warnings must be repeated after the passage of time is a recurring one, and the Second Circuit's decision in this case contributes to a conflict among the federal circuit courts on this issue. This case presents the Court with an opportunity to clarify the factors that courts should weigh in evaluating claims that the passage of time undermined the effectiveness of *Miranda* warnings.

Second, the State is seeking a writ of certiorari because this case presents a highly controversial question of widespread significance concerning the application of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), in habeas cases subject to the standard of review established by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). After holding that it was unreasonable under 28 U.S.C. § 2254(d)(1) for the state appellate court to determine that admission of defendant's confession was harmless error, the Second Circuit granted habeas relief without inquiring if the alleged trial error was prejudicial under the *Brecht* test. If the Second Circuit was correct in holding that defendant's confession was obtained in violation of *Miranda*, then this case squarely presents the Court with the issue of

whether the *Brecht* test applies to post-AEDPA claims of constitutional trial error. The Second Circuit's decision to jettison *Brecht* is at odds with the intent underlying AEDPA to provide deference to state court decisions and with the interests of comity and finality emphasized by the Court in *Brecht*. The decision in this case also puts the Second Circuit at odds with most federal circuit courts that have considered the issue. The State maintains that, contrary to the Second Circuit's conclusion, the state court's harmless error determination was not an unreasonable application of the harmless error standard of *Chapman v. California*, 386 U.S. 18 (1967). But even if the state court's application of *Chapman* was unreasonable, then the proper application of the *Brecht* standard, which is more favorable to the State than the *Chapman* standard, would compel the denial of habeas relief.

Because the Second Circuit's decision to grant habeas relief presents these two important issues, the State's petition for a writ of certiorari should be granted.

I. The Second Circuit's Decision Presents an Important and Recurring Question, on Which the Federal Courts of Appeals Have Reached Conflicting Results, of When a Lapse of Time Between the Administration of *Miranda* Warnings and a Suspect's Statement Undermines the Effectiveness of the Warnings and Renders the Statement Inadmissible.

This case presents this Court with the opportunity to provide guidance on an important and recurrent question under *Miranda v. Arizona*, 384 U.S. 436 (1966), namely, under what circumstances a lapse of time between *Miranda* warnings and a suspect's custodial statement renders the warnings ineffective and the statement inad-

missible. Federal courts "have generally rejected a *per se* rule as to when a suspect must be readvised of his rights after the passage of time or a change in questioners." *United States v. Andaverde*, 64 F.3d 1305, 1312 (9th Cir. 1995), *cert. denied*, 516 U.S. 1164 (1996); *see United States v. Weekley*, 130 F.3d 747, 751 (6th Cir. 1997). In fact, "a number of circuits have ruled that re-warning is not required simply because time has elapsed." *Weekley*, 130 F.3d at 751; *see, e.g.*, *United States v. Rodriguez-Preciado*, 399 F.3d 1118 (9th Cir. 2005) (interval of sixteen hours between *Miranda* warnings and second interrogation of defendant did not render defendant's statements inadmissible); *United States v. Pruden*, 398 F.3d 241 (3d Cir. 2005) (confession was admissible where about twenty hours passed between *Miranda* warnings and questioning that led to confession).

In contrast to the Second Circuit's holding in this case, the Ninth Circuit has repeatedly held that confessions made a day or more after *Miranda* warnings did not have to be suppressed. *See Andaverde*, 64 F.3d at 1313 (one-day interval between *Miranda* warnings and statement to parole officer); *Puplampu v. United States*, 422 F.2d 870 (9th Cir.) (statements made two days after *Miranda* warnings), *cert. denied*, 399 U.S. 914 (1970); *Maguire v. United States*, 396 F.2d 327 (9th Cir. 1968) (*Miranda* warnings given three days before defendant's interrogation were sufficient), *cert. denied*, 393 U.S. 1099 (1969); *see also McClain v. Hill*, 52 F. Supp. 2d 1133, 1141 (C.D. Cal. 1999) (state court's rejection of claim that *Miranda* warnings should have been repeated was neither contrary to, nor unreasonable application of, federal law under 28 U.S.C. § 2254[d]; "the mere passage of two days between the time petitioner was informed of and waived his Miranda rights and the time he made his incriminating statement does not violate the Fifth Amendment").

Other federal courts of appeals have held that even the lapse of a week or more between *Miranda* warnings and a defendant's statement did not render the statement inadmissible at trial. In *Martin v. Wainwright*, 770 F.2d 918 (11th Cir. 1985), *modified on other grounds*, 781 F.2d 185 (11th Cir.), *cert. denied*, 479 U.S. 909 (1986), the Eleventh Circuit held that failure to rewarn a defendant prior to his confession on July 11, after *Miranda* warnings had been given on July 4, did not render his confession inadmissible. 770 F.2d at 930-31. Similarly, in *Biddy v. Diamond*, 516 F.2d 118 (5th Cir. 1975), *cert. denied*, 425 U.S. 950 (1976), the Fifth Circuit held that statements were properly admitted although they were made twelve days after *Miranda* warnings were given. *Id.* at 122.

Decisions of state courts of last resort likewise illustrate "the lack of consensus regarding when renewed *Miranda* warnings must be given." *State v. DeWeese*, 213 W. Va. 339, 352, 582 S.E.2d 786, 799 (2003) (collecting cases and concluding, as matter of state public policy, that lapse of seven days between initial waiver of rights and subsequent interrogation required renewed warnings). *Compare Koger v. State*, 117 Nev. 138, 17 P.3d 428 (2001) (incriminating statements made during interview twelve days after *Miranda* warnings were admissible); *Osborne v. State*, 263 Ga. 214, 217, 430 S.E.2d 576, 578 (1993) (warnings and waiver given on day of arrest had not grown stale by next day), *cert. denied*, 510 U.S. 1170 (1994); *and People v. Mickle*, 54 Cal.3d 140, 170, 814 P.2d 290, 305 (1991) (no *Miranda* violation, where rights were given within 36 hours of statement), *cert. denied*, 503 U.S. 988 (1992) *with Commonwealth v. Wideman*, 460 Pa. 699, 708-09, 334 A.2d 594, 599 (1975) (lapse of twelve hours after warnings required suppression of confession); *and Commonwealth v. Murray*, 359 Mass. 541, 544-46, 269 N.E.2d 641, 644

(1971) (waiver of rights not established, where there was lapse of two days between warnings and inculpatory statements).

Although the issue of when a lapse of time requires *Miranda* warnings to be repeated or a statement to be suppressed has produced conflicting results among federal and state courts, this Court itself has not addressed the issue in over twenty years. In *Wyrick v. Fields*, 459 U.S. 42 (1982) (per curiam), the Court overturned an Eighth Circuit decision that had granted a state criminal defendant a writ of habeas corpus on the ground that the defendant's Fifth Amendment right to have counsel present at an interrogation had been violated. After waiving his *Miranda* rights and taking a polygraph test, the defendant made incriminating statements in response to post-test questioning by the government polygrapher. The *Wyrick* Court, endorsing a "totality of the circumstances" test, determined that *Miranda* warnings did not need to be repeated to the defendant when he was questioned after the polygraph test. *Id.* at 47. This Court observed that the defendant validly waived his right to have counsel present at the post-test questioning "unless the circumstances changed so seriously that his answers no longer were voluntary, or unless he no longer was making a 'knowing and intelligent relinquishment or abandonment' of his rights." *Id.* at 47-49 (quoting *Edwards v. Arizona*, 451 U.S. 477, 482 [1981]). In support of its holding, the Court noted that "the questions put to [the defendant] after the examination would not have caused him to forget the rights of which he had been advised and which he had understood moments before." 459 U.S. at 49.

The lapse of time involved in *Wyrick*, however, was not substantial, and after *Wyrick*, no decision of this Court has provided any clear guidance on the present

issue. Thus, the factors that are significant to the "totality of the circumstances" test remain uncertain for courts facing the question of whether a lapse of time undermines the effectiveness of *Miranda* warnings and renders a defendant's statement inadmissible. This uncertainty has led to conflict among the circuits. Furthermore, it is of utmost practical importance for police and other law enforcement officers who are administering *Miranda* warnings to have some "concrete constitutional guidelines," *see Miranda*, 384 U.S. at 442, to specify when, and to what degree, a suspect must be reminded of his rights.

The Second Circuit held that admission of defendant's confession violated his due process rights (App. at 22a). 391 F.3d at 474. In its opinion, the Second Circuit majority appeared to adopt, without further analysis, the state appellate court's rationale for finding *Miranda* error: (1) that 24 hours elapsed between *Miranda* warnings and questioning about Scarpati's murder; (2) that defendant was not in continuous police custody between the warnings and the later interrogation; and (3) that the second interrogation concerned a crime unrelated to that for which defendant was initially arrested (App. at 22a). 391 F.3d at 474. But each of these facts fails to support the Second Circuit's conclusion that there was a *Miranda* violation.

First, there would, in general, be no reason to believe that the passage of 24 hours "caused [defendant] to forget the rights of which he had been advised and which he had understood." *See Wyrick*, 459 U.S. at 49. But in this case, just before defendant made his statement, Detective McMahon explicitly reminded defendant that Detective Delahunt had previously advised defendant of his rights, and Detective McMahon told defendant that if he wanted a lawyer, one would be obtained and the

police would not speak to defendant (Delahunt: 83-84; McMahon: 95, 100-01).[1] As the state hearing court found when it denied the motion to suppress the statement (App. at 81a, 84a-85a), the circumstances show that defendant was fully aware of his *Miranda* rights when he spoke to the police (*see* App. at 53a & n.16, 391 F.3d at 490 & n.20 [Raggi, J., dissenting]). Thus, in this case, the passage of 24 hours after the administration of *Miranda* warnings was particularly inconsequential.

Second, even assuming that continuity of custody may be a factor to consider in evaluating whether *Miranda* warnings remain effective, defendant's custody was interrupted only because defendant briefly escaped from the police and ran away; his custody resumed as soon as his police escort caught up to him at an intersection a short distance away. Thus, the break in custody in this case was at most nominal and provided no reasoned basis for the Second Circuit's conclusion that a *Miranda* violation occurred (*see* App. at 52a, 391 F.3d at 490 [Raggi, J., dissenting]).

Third, the subject matter of the second police interrogation provided no sufficient basis for finding a *Miranda* violation. *See United States ex rel. Henne v. Fike*, 563 F.2d 809, 814 (7th Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978). This Court has never held that *Miranda* warnings are specific to a particular investigation or offense. To the contrary, the Court has resisted the notion that the scope of *Miranda* warnings or a suspect's waiver of *Miranda* rights is limited by the subject matter of an interrogation. *See Colorado v. Spring*, 479 U.S. 564, 573-75 (1987) (failure of police to inform sus-

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[1] Numbers in parentheses refer to pages of the suppression hearing transcript; names preceding page numbers identify the witnesses whose testimony is cited.

pect of subject matter of interrogation did not undermine *Miranda* warnings or suspect's waiver).

Therefore, the petition for certiorari should be granted to clarify when the passage of time between *Miranda* warnings and a suspect's statement requires a repetition of the warnings in order to render the statement admissible.

II. The Second Circuit's Decision Presents an Important and Recurring Question, on Which the Federal Courts of Appeals Have Reached Conflicting Results, of Whether the *Brecht* Standard of Harmless Error Applies on Habeas Corpus Review Under 28 U.S.C. § 2254, as Amended by the Antiterrorism and Effective Death Penalty Act of 1996.

Regardless of whether this Court grants certiorari on the *Miranda* issue, this case presents a separate question of enormous significance that should be resolved by the Court: whether the harmless error standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), continues to apply on habeas review after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996. In this case, the Second Circuit decided to grant habeas relief without applying the *Brecht* standard of harmless error analysis or deciding whether application of that standard would have led to a different result. The denial to the State of the benefit of the *Brecht* standard presents a serious conflict with the congressional intent underlying the 1996 amendments to the habeas statute and with the decisions of other federal courts of appeals. Moreover, the proper resolution of this issue would affect the determination of countless cases in federal court, because the issue arises in every case on federal habeas review of a state conviction in which the petition was filed after the

effective date of the 1996 amendments and in which the State argues, in response to at least one of the habeas petitioner's claims, than an alleged error was harmless.

In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), this Court held that federal habeas relief could not be granted on the basis of a prisoner's meritorious claim of unconstitutional trial error unless the error had a substantial and injurious effect or influence in determining the jury's verdict. *Id.* at 638-39 (adopting standard set forth in *Kotteakos v. United States*, 328 U.S. 750, 776 [1946]); *cf. Chapman v. California*, 386 U.S. 18, 24 (1967) (test of harmless error on direct review is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"). In adopting the *Brecht* standard, the Court noted that state courts "often occupy a superior vantage point from which to evaluate the effect of trial error" and observed that "it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review." *Brecht*, 507 U.S. at 636. The Court explained that concerns of finality, comity, and federalism underlay its decision in *Brecht*. *Id.* at 634-36. To find an error harmless under *Brecht*, the evidence need not be "overwhelming," but only "weighty." *Id.* at 639 (finding error harmless, where evidence of defendant's guilt was, "if not overwhelming, then certainly weighty").

The federal habeas statute, as amended by AEDPA, provided a "new, highly deferential standard for evaluating state court rulings." *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997). Thus, the rationale for the *Brecht* standard is no less valid after AEDPA than it was before AEDPA. "Nothing in the AEDPA suggests that it is appropriate to issue writs of habeas corpus even though

any error of federal law that may have occurred did not affect the outcome." *Aleman v. Sternes*, 320 F.3d 687, 690 (7th Cir. 2003). On the contrary, "[t]he concerns that prompted the Court in *Brecht* to adopt a less stringent standard for harmless error assessment on collateral review are the same ones that led Congress to pass AEDPA." *Herrera v. Lemaster*, 301 F.3d 1192, 1198 (10th Cir. 2002) (en banc), *cert. denied*, 537 U.S. 1197 (2003).

Indeed, the AEDPA amendments "elevated the importance of th[e] principle [that constitutional error in a state criminal trial does not in itself justify federal habeas relief] and widened the area within which federal habeas courts must defer to state court decisions." *Sanna v. DiPaolo*, 265 F.3d 1, 6 (1st Cir. 2001). As the Court observed in *Brecht*, "[o]verturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under *Chapman* undermines the States' interest in finality and infringes upon their sovereignty over criminal matters." *Brecht*, 507 U.S. at 637.

The Second Circuit's decision to abandon *Brecht* in this case conflicts with the decisions of six other federal circuit courts, which have decided that *Brecht* applies to post-AEDPA claims involving harmless error questions on habeas review, whether or not an unreasonable-application-of-*Chapman* step is also required; and the Second Circuit's decision is consistent with only one other federal circuit court. *Compare Jones v. Polk*, 401 F.3d 257, 265 (4th Cir. 2005); *Allen v. Lee*, 366 F.3d 319, 322 (4th Cir. 2004) (en banc) (state court's finding of harmless error did not satisfy AEDPA standard, and error was not harmless under *Brecht*); *Cotton v. Cockrell*, 343 F.3d 746, 750 (5th Cir. 2003) (habeas petitioner must show not only that state court's decision was con-

trary to or unreasonable application of clearly established federal law, but also that it was harmful under *Brecht*), *cert. denied*, 540 U.S. 1186 (2004); *Aleman v. Sternes*, 320 F.3d 687, 690-91 (7th Cir.) (*Brecht* survived AEDPA and figures with *Chapman* in analysis of habeas claims), *cert. denied*, 539 U.S. 960 (2003); *Robertson v. Cain*, 324 F.3d 297, 307 (5th Cir. 2003); *Herrera v. Lemaster*, 301 F.3d 1192, 1200 (10th Cir. 2002) (en banc) (habeas court is to apply *Brecht* "when a state court decides a constitutional issue contrary to controlling Supreme Court authority or unreasonably applies that authority"), *cert. denied*, 537 U.S. 1197 (2003); *Ford v. Curtis*, 277 F.3d 806 (6th Cir. 2002) (applying *Brecht* and concluding that trial court's failure to provide limiting instruction for admitted hearsay statements did not have harmful or injurious effect); *Sanna v. DiPaolo*, 265 F.3d 1, 14-15 (1st Cir. 2001) (noting that First Circuit has "consistently employed *Brecht* in cases arising under AEDPA"); *and Nevers v. Killinger*, 169 F.3d 352, 371 (6th Cir.) (*Brecht* standard "precisely captures Congress's intent as expressed in AEDPA"), *cert. denied*, 527 U.S. 1004 (1999), *abrogated on other grounds*, *Harris v. Stovall*, 212 F.3d 940, 942 (6th Cir. 2000) *with Whitmore v. Kemna*, 213 F.3d 431, 433 (8th Cir. 2000) (expressing doubt as to *Brecht*'s application after AEDPA in case where state court performed *Chapman* analysis, but concluding that denial of habeas relief was warranted under both standards).

In addition, the Second Circuit's decision conflicts with the decisions of federal circuit courts that have held that federal prisoners seeking habeas relief under the provisions of 28 U.S.C. § 2255 may not obtain habeas relief unless the claimed error is not harmless under the *Brecht* standard. *See, e.g., United States v. Montalvo*, 331 F.3d 1052, 1058 (9th Cir. 2003) (holding that "*Brecht*'s harmless error standard applies to habeas cases

under section 2255, just as it does to those under section 2254"), *cert. denied*, 541 U.S. 1011 (2004); *Ross v. United States*, 289 F.3d 677 (11th Cir. 2002); *Murr v. United States*, 200 F.3d 895, 906 (6th Cir. 2000). It is anomalous, and offensive to comity and federalism, for a federal court to set aside a New York State conviction without testing the prisoner's claim of constitutional trial error for prejudice under the *Brecht* standard, when federal courts are according federal convictions the greater protection of testing under that standard.

The Second Circuit majority erred in holding that it could dispense with the *Brecht* test and grant habeas relief solely on the basis of its holding that the Appellate Division's harmless error determination constituted an unreasonable application of the *Chapman* test. The language of section 2254(d) of the habeas statute, as amended by AEDPA, does not purport to limit the application of *Brecht*. "The words of the statute simply cannot be read to bar federal courts from further examination and review of state habeas claims based on additional standards established by Supreme Court precedent, especially when those standards are not inconsistent with the language and purpose of AEDPA." *Robertson v. Cain*, 324 F.3d 297, 306 (5th Cir. 2003).

The Second Circuit cited *Mitchell v. Esparza*, 540 U.S. 12 (2003) (per curiam), in support of the Second Circuit's decision to abandon *Brecht* (*see* App. at 7a-8a; 391 F.3d at 467), but the Second Circuit's interpretation of *Mitchell* is incorrect. The Second Circuit asserted that *Mitchell* "arguably resolved" uncertainty as to whether *Brecht* still applied after AEDPA or habeas courts should instead inquire whether state courts unreasonably applied the *Chapman* standard (App. at 7a). 391 F.3d at 467. However, this Court did not decide in *Mitchell* that the *Brecht* standard no longer applied after AEDPA.

Rather, in *Mitchell*, this Court concluded that the state court did not unreasonably apply *Chapman* and that consequently habeas relief was unwarranted. 540 U.S. at 19. In light of that holding, it was neither necessary nor prudential for the Court to decide whether, if the state court's harmless error determination constituted an unreasonable application of *Chapman*, the *Brecht* test should apply to habeas claims of trial error under AEDPA. Thus, the Second Circuit's decision to abandon *Brecht* misconstrued *Mitchell* while ignoring this Court's post-AEDPA application of *Brecht* in *Penry v. Johnson*, 532 U.S. 782, 795-96 (2001). *See also Early v. Packer*, 537 U.S. 3, 10-11 (2002) (per curiam) (suggesting that inquiry into whether state court's decision had substantial and injurious effect on verdict would have been proper if Ninth Circuit had first correctly found that state court decision was contrary to clearly established Supreme Court law, but holding that state court's decision was neither contrary to nor unreasonable application of clearly established federal law).

The ruling of the Second Circuit in this case not only undermines *Brecht*, a mainstay of this Court's habeas jurisprudence, but also subverts AEDPA's reforms by fostering an interpretation of the statute under which state court convictions will be treated with *less* deference, not more. Indeed, the path the Second Circuit has taken leads to incongruous results on federal habeas review: state convictions would receive less deference if AEDPA applies than if AEDPA does not apply, and federal convictions would receive greater deference than state convictions.

Moreover, the Second Circuit's failure to apply *Brecht* could certainly have affected the decision to grant habeas relief and places the controversial question of *Brecht*'s applicability squarely in issue in this case. The

admission of defendant's confession to the police did not have a substantial and injurious effect or influence on the verdict. The Appellate Division, concluding that the evidence of defendant's guilt was overwhelming and that the admission of the confession to police did not contribute to the verdict, succinctly described the other evidence as follows:

> A witness testified that the defendant was with Scarpati [the victim] in room 234 of the Golden Gate Inn in the days and hours immediately before the crime. Surveillance videotape from the motel showed the defendant leaving and then reentering the motel shortly before the police arrived and arrested him on March 17, 1998. Expert testimony indicated that Scarpati's death occurred sometime between the evening of March 16 and the early morning of March 17. The key to Room 234, the room where Scarpati's body was found, was recovered from defendant's person after his arrest. D.N.A. testing of blood found on the defendant's clothing revealed that the blood was Scarpati's. In addition, the defendant admitted to an inmate, who was incarcerated with the defendant pending trial, that when he choked Scarpati "blood came out."

(App. at 78a-79a). 282 A.D.2d at 698, 724 N.Y.S.2d at 436.

In her dissent in the Second Circuit, Judge Raggi agreed with the district court and the Appellate Division that the other evidence of defendant's guilt was overwhelming. Judge Raggi considered it "entirely reasonable for the Appellate Division to have cited [the surveillance] evidence, together with [Aaron] Cohen's testimony and Zappulla's possession of the motel room key, as overwhelming proof, independent of the signed confession, that Zappulla was with Scarpati at and about

the time of her death" (App. at 31a). 391 F.3d at 479. Judge Raggi further noted that "[b]ecause any other conclusion about the blood evidence is too improbable to make sense, it was not 'objectively unreasonable' for the Appellate Division to view this compelling forensics evidence of Zappulla's guilt as further support for a finding of harmless error" (App. at 34a). 391 F.3d at 480. Judge Raggi noted that, although the circumstantial evidence of Zappulla's guilt was "remarkably strong," the prosecution had also offered direct proof in the form of Zappulla's admission to fellow inmate Felix Pabon (App. at 35a), 391 F.3d at 481, which was "considerably more detailed about events related to Scarpati's murder than his signed confession to the police" (App. at 37a). 391 F.3d at 482. Under these circumstances, application of the *Brecht* test would compel the conclusion that any error in admitting defendant's confession to the police was harmless.

Accordingly, this Court should grant a writ of certiorari in this case to answer this important question, and to resolve the conflict among the federal courts of appeals, concerning the continued applicability of the *Brecht* harmless error standard on habeas corpus review.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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